FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

February 12, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 2001-5
	:	A.C. No. 44-06364-03606
POWELL MOUNTAIN COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 2, 2000, the Commission received from Powell Mountain Coal Company, Inc. ("Powell") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Powell.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its letter submitted by Powell's safety director, Foster Tankersley, Powell contends that in August 2000, it received a proposed assessment that included a penalty assessed for a citation which had been erroneously issued to it. Mot. Powell claims that upon discovering the error, it contacted the conference litigation officer in the regional office of the Department of Labor's Mine

Safety and Health Administration ("MSHA") on August 22, 2000, and was advised not to pay the proposed assessment, but to wait until it received a new proposed assessment. *Id.* Powell submits that on October 16, 2000, it received a letter from the "Director of Assessments," confirming that the citation had been erroneously assessed. *Id.* Powell asserts that because the letter had no instructions regarding payment, it called MSHA's Assessments Office and was told that it should continue to wait for the new assessment. *Id.* Powell alleges that on October 30, it received a notice from MSHA's Civil Penalty Compliance Office stating that it was delinquent in the payment of the proposed assessment. *Id.* It contends that it inquired with MSHA why it was considered delinquent, and was told that the time continued to run while it awaited the new assessment. *Id.* Powell asserts that it intended to contest some of the citations in the proposed assessment, and was waiting until it received the new assessment to file a hearing request. *Id.* Powell requests that the Commission reopen the matter so that it may contest the proposed assessment and proceed to a hearing on the merits. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Powell's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Powell has met the criteria for relief under Rule 60(b). *See Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to a judge where movant failed to timely file hearing request due to erroneous belief that hearing for individual assessment would be automatically consolidated with pending hearing involving assessment issued to movant's employer based on movant's conference call with ALJ and the Secretary's counsel); *M & Y Servs., Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where operator failed to timely file hearing request due to inability to obtain assistance from MSHA about contest procedures despite repeated efforts to contact MSHA). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

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